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Attorneys for Plaintiff  
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION  
UNITED STATES OF AMERICA, ) NO. CR 05-316-DSF  
)  
Plaintiff, ) **GOVERNMENT'S POSITION REGARDING**  
) **RESTITUTION OF DEFENDANT RICHARD B.**  
v. ) **LEONARD**  
)  
JOHN S. LIPTON, et al., ) RESTITUTION HEARING:  
)  
Defendants. ) Date: December 7, 2009  
) Time: 8:30 a.m.  
)  
)  
)  
)

Plaintiff, United States of America, by and through its  
counsel of record, Trial Attorneys Lori A. Hendrickson, Ellen M.  
Quattrucci, and Danny N. Roetzel, Department of Justice, Tax  
Division, hereby files its Position Re: Restitution.

The government's position is based on the attached

1 memorandum of points and authorities; the record and file in this  
2 case; and any additional evidence and argument that the Court  
3 receives prior to or at the hearing on defendant LEONARD's  
4 restitution. The government has filed its Exhibits in support of  
5 its restitution calculation under separate cover concurrently  
6 herewith.

7  
8 Dated: November 23, 2009

Respectfully Submitted,

9  
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Acting United States Attorney

11 CHRISTINE C. EWELL  
12 Assistant United States Attorney  
13 Chief, Criminal Division

14  
15 /s/Ellen Quattrucci  
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18 Attorneys for Plaintiff  
19 United States of America  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I****INTRODUCTION**

The government recommends that defendant RICHARD B. LEONARD ("defendant LEONARD") be ordered to pay restitution in the amount of \$2,945,186.02. This restitution amount is based upon the tax loss and interest due to the Internal Revenue Service as a result of the conspiracy to which LEONARD pleaded guilty. Specifically, as charged in Count 68 (and admitted to by defendant LEONARD), he conspired with his co-defendants JOHN S. LIPTON, VICTOR H. PRESTON, MICHAEL L. PUTNAM, WILLIAM H. NURICK, MARLYN D. HINDERS, DAVID L. JOHNSON, and others to conceal income from the Internal Revenue Service.

The government calculated the tax loss and interest due from each co-defendant as follows:

	Genesis Fund Distributions	Tax Loss	Interest	Total (Tax Loss + Interest)
LEONARD	\$ 1,767,940.45	\$342,180	\$ 227,478.07	\$ 569,658.07
PRESTON	\$ 936,692.91	\$212,311	\$ 137,184.35	\$ 349,495.35
PUTNAM	\$ 1,543,705.56	\$308,272	\$ 227,432.29	\$ 535,704.29
NURICK	\$ 1,360,009.77	\$143,221	\$ 123,476.15	\$ 266,697.15
HINDERS	\$ 925,061.52	\$71,964	\$ 49,807.04	\$ 121,771.04
JOHNSON	\$ 2,464,593.41	\$238,558	\$ 178,868.92	\$ 417,426.92
LIPTON	\$ 1,724,703.27	\$334,854	\$ 349,579.20	\$ 684,433.20
	\$10,722,706.89	\$1,651,360	\$1,293,826.02	\$2,945,186.02

Defendant LEONARD, who received the largest sum of Genesis Fund distributions, knew the object of the conspiracy was to

1 defraud the United States. The conspiracy and defendant  
2 LEONARD's actions in furtherance of the conspiracy resulted in an  
3 actual loss of \$2,945,186.02 to the Internal Revenue Service.  
4 Pursuant to his plea agreement, defendant LEONARD should be  
5 ordered to pay \$2,945,186.02 in restitution to the Internal  
6 Revenue Service.

## 7 II

### 8 FACTS

#### 9 A. Offense Conduct

10 From July 1994 to May 2005, defendants, including defendant  
11 LEONARD, and co-conspirators Edward J. Lashlee ("Lashlee"), a  
12 Costa Rican lawyer and others conspired to defraud the United  
13 States, specifically the Internal Revenue Service, Department of  
14 the Treasury of revenue: namely, the individual income taxes owed  
15 by defendants on income they received from the Genesis Fund,  
16 including the income received by defendant LEONARD. (See Exhibit  
17 1, Summary Schedule of Tax Calculations for Defendants.<sup>1</sup>)  
18 Defendant LEONARD further willfully attempted to evade the  
19 assessment and payment of his individual income taxes due to the  
20 United States Treasury.<sup>2</sup> (See Exhibit 2, Individual Income  
21 Summary for Richard B. Leonard.)  
22

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23 <sup>1</sup>The exhibits referred to in this Memorandum have been filed  
24 separately in redacted form to delete any personal identifying  
25 information such as social security number. The document is  
26 entitled "Government's Exhibits in Support of Government's  
Position Regarding Restitution of Defendant Richard B. Leonard."

27 <sup>2</sup> The government has set forth the additional charged  
28 conduct in Exhibit 10, Narrative Summary of Case.

1 Specifically, co-conspirator Lashlee opened bank accounts  
2 for defendant LEONARD and others, including some Genesis Fund  
3 investors, in the names of trusts into which distributions from  
4 the Genesis Fund were then deposited. (See, e.g., Exhibit 3,  
5 Nominee Entities Utilized by Richard B. Leonard.) Aided and  
6 abetted by Lashlee, defendants and others used various bank  
7 accounts held in the names of trusts or other entities to deposit  
8 their Genesis Fund income. Specifically, defendant LEONARD used  
9 an account at Paine Webber UBS in the name of Ortega Management  
10 Trust to deposit his Genesis Fund income.

11 In early 1999, the defendants, including defendant LIPTON,  
12 and others, agreed to create "disclosed" Genesis Fund accounts in  
13 order to report to the Internal Revenue Service some, but not  
14 all, of their Genesis Fund distributions. The "undisclosed"  
15 accounts had been established before 1999 and were not to be  
16 reported to the Internal Revenue Service. Also in 1999,  
17 defendant LIPTON, defendant LEONARD and others, caused the Costa  
18 Rican lawyer to create Costa Rican corporations and related bank  
19 accounts and obtain credit cards supported by those accounts for  
20 the purpose of receiving Genesis Fund distributions. These Costa  
21 Rican corporations and related bank accounts were established for  
22 the purpose of receiving Genesis Fund income in order to evade  
23 reporting income to the IRS. The name of the corporation  
24 defendant LEONARD used for this purpose was Abetos Del Bosque  
25 Lluvioso S.A. at Banco Elca. Additionally, defendant LEONARD and  
26 others recommended to some Genesis Fund investors that they use  
27 the services of the same Costa Rican lawyer to create Costa Rican  
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1 corporations and bank accounts in order to receive distributions  
2 from the Genesis Fund. One example of defendant's evasion was  
3 that on January 28, 1999, LEONARD caused International Centrix  
4 check #5355 in the amount of \$10,000 to be deposited into Account  
5 #xx xxx4051 in the name of Ortega Management Trust at Paine  
6 Webber (now UBS Paine Webber). Another illustration of his  
7 conduct is that during 2000, LEONARD utilized bank accounts in  
8 the name of Abetos Del Bosque Lluvioso S.A., specifically the use  
9 of credit cards issued on the accounts, in order to evade income  
10 taxes.

11 During the calendar years 1999 through 2002, the defendants  
12 did not fully report their Genesis Fund income on their personal  
13 income tax returns, and no tax returns were filed on behalf of  
14 the nominee entities. Defendant LEONARD and other defendants  
15 received income substantially in excess of the minimum filing  
16 requirement amount set by the Internal Revenue Service which they  
17 did not report to the Internal Revenue Service, and upon which  
18 they owed significant individual income taxes for the years 1999  
19 through 2002. (See Exhibits 1, 2, and 4-9, Summary Schedule of  
20 Tax Calculations and Individual Income Summary for each  
21 defendant.)

22 **B. Proceedings**

23 Defendants were indicted on March 30, 2005, in an 83-count  
24 indictment charging violations of the conspiracy, wire and mail  
25 fraud, tax fraud, money laundering, obstruction and forfeiture  
26 statutes. Shortly thereafter, defendants DAVID L. JOHNSON  
27 ("JOHNSON"), WILLIAM H. NURICK ("NURICK"), DENISE TAYLOR-FRASER  
28

1 ("D. TAYLOR-FRASER, WILLIAM TAYLOR-FRASER ("W. TAYLOR-FRASER")  
2 and TERESA R. VOGT ("VOGT") were arrested pursuant to arrest  
3 warrants in the Central District of California and subsequently  
4 released on bond.

5 Defendants JOHN S. LIPTON ("LIPTON"), RICHARD B. LEONARD  
6 ("LEONARD") and VICTOR H. PRESTON ("PRESTON") were arrested in  
7 May 2005 and detained pursuant to provisional arrest warrants in  
8 Costa Rica, and ultimately extradited to the Central District of  
9 California in mid-June 2007. This Court detained defendants  
10 LIPTON, LEONARD and PRESTON, pursuant to the standards set forth  
11 in the Bail Reform Act, 18 U.S.C. § 3142 et seq. Defendant  
12 LIPTON remains detained. Defendant PRESTON pleaded guilty to  
13 Count 68 of the Indictment and was released from custody  
14 following his sentencing on October 7, 2009.

15 Pursuant to various stipulations by defendants and the  
16 government, the Court initially set a trial date of January 15,  
17 2008, and subsequently continued to April 1, 2009. On September  
18 19, 2008, Defendant NURICK filed a motion to continue the trial  
19 date of April 1, 2009. Additionally, on October 20, 2009, the  
20 government filed a motion requesting the Court to sever counts 68  
21 through 80 for all defendants, and to permit the parties to  
22 proceed to trial on these counts on the then-trial date of April  
23 1, 2009. The Court granted both the motion to continue and the  
24 government's motion to sever. On March 11, 2010, the Court set a  
25 new trial date of October 21, 2009 for counts 68 through 80, and  
26 a subsequent trial date of March 17, 2009 for counts 1 through 67  
27 and 81 through 83. On October 5, 2009, the Court continued the  
28

1 trial date on the tax charges to March 17, 2010 and ordered the  
2 parties to agree to a date in August 2010 for the fraud, money  
3 laundering and forfeiture charges.

4 On December 1, 2008, defendant LEONARD pleaded guilty to  
5 Conspiracy to Defraud an Agency of the United States, in  
6 violation of 18 U.S.C. § 371; and attempted tax evasion for the  
7 calendar year 2000, in violation of 26 U.S.C. § 7201. (PSR ¶¶ 3-  
8 5). In the plea agreement, LEONARD agreed, inter alia, to make  
9 full restitution for the losses caused by his activities. The  
10 government also noted in the plea agreement that it believed the  
11 applicable amount of restitution was \$3,000,000, but recognized  
12 and agreed that this amount could change based on facts that came  
13 to the attention of the parties prior to sentencing.

14 On January 30, 2009, the Probation Office disclosed the PSR.  
15 In the PSR, the Probation Officer found that LEONARD's total  
16 advisory guidelines offense level is 23, resulting in an advisory  
17 sentencing guidelines range of 46-57 months. After considering  
18 all of the factors listed in 18 U.S.C. § 3553(a), the Probation  
19 Officer recommended a sentence at the low end of the advisory  
20 range, i.e., 46 months. (Rec. Let. at 3).

21 On February 11, 2009, the government filed a Sentencing  
22 Memorandum. With respect to incarceration, the government argued  
23 in its Sentencing Memorandum that considering all of the §  
24 3553(a) factors, and specifically LEONARD's health and the fact  
25 that he had already served a significant term of incarceration, a  
26 "time served" custodial sentence was warranted. The government  
27 also argued that LEONARD should be ordered to make complete  
28



1 restitution for the criminal conspiracy to which he pleaded  
2 guilty, and that the applicable amount of restitution, supported  
3 by exhibits filed under seal, was \$3 million.

4 The Court sentenced LEONARD on February 23, 2009 to "time  
5 served," to be followed by three years supervised release. The  
6 Court deferred determination of any restitution to be paid by  
7 LEONARD pursuant to 18 U.S.C. § 3664(d)(5). The Court  
8 subsequently scheduled a Restitution Hearing for July 27, 2009.  
9 On July 27, 2009, the hearing was continued again at the request  
10 of defendant LEONARD to enable him additional time to review the  
11 government's computation of the tax loss arising from the  
12 conspiracy. The hearing was continued until October 5, 2009.  
13 After receiving permission from the Court, the government  
14 disclosed its supporting documentation to defendant LEONARD and  
15 his retained expert, Mr. Alfonso Ristuccia. On October 5, 2009,  
16 defendant LEONARD sought to continue the restitution hearing a  
17 third time based upon the need for additional time to review and  
18 analyze the government's tax loss calculation. The restitution  
19 hearing was continued to December 7, 2009.

### 20 III

#### 21 ARGUMENT

#### 22 A. Defendant Should Be Ordered to Make Complete Restitution for 23 the Criminal Conspiracy to Which He Pleaded Guilty

##### 24 1. The Total Loss to the Internal Revenue Service Is at 25 Least \$3 Million

26 The plea agreement allowed the parties to argue to the Court  
27 the amount of restitution to be imposed in this matter.  
28

1 Paragraph 9 of the plea agreement states in full:

2       *Defendant agrees to make full restitution for the*  
3       *losses caused by defendant's activities. The Offices*  
4       *currently believe that the applicable amount of*  
5       *restitution is \$3,000,000, but recognize and agree that*  
6       *this amount could change based on facts that come to*  
7       *the attention of the parties prior to sentencing.*  
8       *Defendant further agrees that defendant will not seek*  
9       *the discharge of any restitution obligation, in whole*  
10       *or in part, in any present or future bankruptcy*  
11       *proceeding.*

12       The government's position is that the applicable amount of  
13       restitution is \$2.945 million, as supported by the exhibits  
14       submitted concurrently with this filing. Conservatively, as set  
15       forth in the government's exhibits, the Genesis Funds that were  
16       distributed to the defendants were \$10,722,706.89.<sup>3</sup> (Exhibit 1,  
17       Summary Schedule of Tax Calculations). This amount does not  
18       include distributions to Genesis clients. To be conservative,  
19       the government has subtracted the alleged capital contributions  
20       of all defendants except LIPTON.<sup>4</sup> At a conservative capital gains  
21       tax rate of 25%, the amount of tax loss would be \$1,651,360.00,

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22       <sup>3</sup> The government had originally calculated the total  
23       unreported income of the co-defendants to be \$12,637,718.88.  
24       This figure included \$1.3 million in income that George "Bo"  
25       Boeck received from the Genesis Fund. Because the government's  
26       restitution was capped at \$3,000,000 under the plea agreement,  
27       the government removed Boeck's income from the calculation  
28       because there was a question as to whether Mr. Boeck was a U.S.  
citizen. After reviewing the calculations with Mr. Ristuccia,  
the government removed an additional \$615,011.99 in income it  
attributed to the conspiracy because there was a chance that the  
income was double-counted.

<sup>4</sup> Defendant LIPTON's purported capital contributions are  
not deducted because there is no evidence to support the \$2.8  
million he claims to have contributed. (Exhibit 4, Individual  
Income Summary for John S. Lipton.)

1 not including interest.<sup>5</sup> With interest, the total loss rises to  
2 \$2.945 million. This amount includes \$342,180, the amount of  
3 federal income taxes that defendant Leonard evaded on his  
4 \$1,767,940.45 in Genesis Fund income. (See Exhibit 1).

5 **2. Defendant Is Liable for All Actual Losses Caused By the**  
6 **Tax Fraud Conspiracy**

7 In determining the appropriate amount of restitution, this  
8 Court must determine the actual losses caused by defendant's  
9 fraudulent conduct -- that is, to compare 'what actually happened  
10 with what would have happened if [he] had acted lawfully.'"

11 United States v. Bussell, 414 F.3d 1048, 1061 (9th Cir. 2005).

12 Under this analysis, because defendant was convicted of a  
13 conspiracy to defraud an agency of the United States, the  
14 Internal Revenue Service, the actual loss for restitution  
15 purposes is not restricted to the loss resulting from conduct  
16 underlying particular substantive counts of conviction, e.g.,  
17 defendant's individual income tax evasion. Rather, as the United  
18 States Court of Appeals for the Ninth Circuit has repeatedly  
19 emphasized in construing the statutes governing restitution, the  
20 correct measure of loss encompasses "the amount of damages caused  
21 by an entire scheme that is in the nature of a conspiracy rather

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22  
23 <sup>5</sup> Some co-conspirators did not file tax returns, while  
24 others omitted their Genesis Fund income from returns filed with  
25 the IRS. Still others reported some, but not all Genesis Fund  
26 income. Finally, some of those who reported Genesis Fund income  
27 reported it as ordinary income while others reported the monies  
28 as capital gains. The government has calculated all co-  
conspirator taxes at the capital gains rate. The capital gains  
rate is lower than the applicable marginal individual income tax  
rates, thus crediting defendants an additional benefit.

1 than only in the amount caused by a particular act," including  
2 victims' losses arising through "the duration of the entire  
3 fraudulent scheme." United States v. Kubick, 205 F.3d 1117,  
4 1128-29 (9th Cir. 1999) (construing the scope of restitution  
5 where defendant was convicted of conspiracy to commit bankruptcy  
6 fraud; accord United States v. DeGeorge, 380 F.3d 1203, 1220 (9th  
7 Cir. 2004); United States v. Grice, 319 F.3d 1174, 1177-78 (9th  
8 Cir. 2003); United States v. Reed, 80 F.3d 1419, 1423 (9th Cir.  
9 1996) (observing that 1990 amendment to Victim Witness Protection  
10 Act ("VWPA") provides that courts can order restitution for  
11 damage resulting from any conduct that is part of the  
12 conspiracy).

13 The government's burden in establishing the proper amount of  
14 loss for restitution purposes is preponderance of the evidence.  
15 18 U.S.C. § 3664(e); United States v. Follet, 269 F.3d 996, 2002  
16 (9th Cir. 2001). Where the precise amount of restitution is  
17 difficult to determine, the court is authorized to reach an  
18 expeditious, reasonable determination of restitution by resolving  
19 uncertainties with the aim of achieving fairness to the  
20 victim(s). United States v. Gordon, 393 F.3d 1044, 1054-55 (9th  
21 Cir. 2004). In determining the restitution amount, the court  
22 should focus on the remedial purpose of restitution, which is  
23 "'to restore the defrauded party to the position [it] would have  
24 had absent the fraud.'" Id. at 1053 (citation omitted) (emphasis  
25 in original).

26 Additionally, restitution exceeding the loss of the count of  
27 conviction, however, may be ordered when the defendant agrees to  
28

such in the plea agreement. United States v. Lorenzini, 71 F.3d 1489, 1495 n. 8 (9<sup>th</sup> Cir. 1995). In this case, the defendant agreed, pursuant to his plea agreement, to pay "full restitution for the losses caused by defendant's activities." (Plea Agreement at ¶ 9.) LEONARD's activities included the conspiracy to defraud the IRS in addition to his willful attempt to evade his own income taxes. See United States v. Lawrence, 189 F.3d 838, 846 (9th Cir. 1999) (when count of conviction "includes a scheme, conspiracy, or pattern of criminal conduct as an element of the offense," restitution order may include acts of related conduct for which the defendant was not convicted). The loss amount attributable to the conspiracy to defraud an agency of the United States is \$2.945 million. (See Exhibit 1.) Accordingly, the restitution order should include the entire loss to the Internal Revenue Service, which the government has calculated to be \$2.945,186.02.

**3. The Court Should Reject Any Argument That LEONARD's Distributions Were Not His Personal Income**

The government anticipates that LEONARD may contend at the restitution hearing that the distributions he received should be considered corporate income and not his personal income. In LEONARD's sentencing memorandum, filed previously with the Court, he asserted that his "shares in the Genesis Fund were owned by a corporation called Abetos del Lluvioso" and that "the assets of this corporation are now worthless." (LEONARD Sentencing Mem. at 7.) Any argument by LEONARD that the distributions he received were corporate income and not his personal income should be

1 rejected by the Court.

2 In his guilty plea agreement, LEONARD agreed and stipulated  
3 to the statement of facts set forth in the Factual Basis for  
4 Guilty Plea of Richard B. Leonard. Defendant LEONARD admitted  
5 that his Costa Rican company was created for the purpose of  
6 evading taxes:

7 *Aided and abetted by co-conspirator Lashlee, defendants*  
8 *and others used various bank accounts held in the names*  
9 *of trusts and other entities to deposit their Genesis*  
10 *Fund income. Specifically defendant LEONARD used an*  
11 *account at Paine Webber UBS in the name of Ortega*  
12 *Management Trust to deposit his Genesis Fund income.*

13 . . .

14 *In 1999, defendant LIPTON, acting for himself,*  
15 *defendant LEONARD and others, caused the Costa Rican*  
16 *lawyer to create Costa Rican corporations and related*  
17 *bank accounts and obtain credit cards supported by*  
18 *those accounts for the purpose of receiving Genesis*  
19 *Fund distributions. These Costa Rican corporations and*  
20 *related bank accounts were established for the purpose*  
21 *of receiving Genesis Fund income in order to evade*  
22 *reporting income to the IRS. The name of the*  
23 *corporation defendant LEONARD used for this purpose was*  
24 *Abetos Del Bosque Lluvioso S.A. at Banco Elba.*

25 (Plea Agreement Factual Basis at ¶¶ 19, 21.) Given that LEONARD  
26 has previously admitted that the Abetos Del Bosque Lluvioso  
27 corporation was a nominee entity created to receive his Genesis  
28 Fund distributions, he should not be permitted to argue now that  
the distributions sent to this corporation were not his personal  
income and should not be included in the tax loss calculations.  
Consequently, the total loss to the IRS as a result of the  
charges to which LEONARD pleaded guilty should include the total  
tax and interest due resulting from the Genesis Fund  
distributions received by LEONARD. (See Exhibit 1.)

1           4.    **LEONARD Has Sufficient Information To Contest The**  
2                   **Government's Restitution Calculation**

3           Defendant LEONARD has asked this Court to decline ordering  
4 any restitution in this case because he cannot defend himself  
5 against the government's position. (See Response of Defendant  
6 Leonard to Government's Memorandum Regarding Restitution From  
7 Richard Leonard (Docket Entry No. 774).) Specifically, defendant  
8 LEONARD claims that restitution is inappropriate because he  
9 cannot speak with his co-defendants about their tax liabilities.  
10 The government has provided defendant LEONARD with sufficient  
11 information to challenge its restitution calculation. Defendant  
12 LEONARD was provided with copies of each item of income that the  
13 government included in its calculation of unreported income. In  
14 most instances, this was a cancelled check.

15           Defendant LEONARD joined this conspiracy at his own peril.  
16 Defendant LEONARD received \$1,767,940.45 in income from the  
17 Genesis Fund. As admitted in his guilty plea to Count 68, he  
18 conspired with PRESTON, PUTNAM, NURICK, HINDERS, JOHNSON, and  
19 LIPTON to create "undisclosed" accounts to hide their Genesis  
20 fund distribution from the IRS. LEONARD joined this conspiracy  
21 willingly and benefitted from it greatly. In fact, defendant  
22 LEONARD caused the largest tax loss of all the defendants. (See  
23 Exhibit 1.) When he joined the conspiracy, defendant LEONARD  
24 knew that PRESTON, PUTNAM, NURICK, HINDERS and JOHNSON received  
25 significant income from the Genesis Fund. He also agreed with  
26 his co-defendants to hide this income from IRS.

27           Indeed, TERESA R. VOGT, the administrator of the Genesis  
28

1 Fund, provided evidence that corroborates the government's  
2 calculation. According to VOGT, defendants LEONARD, NURICK,  
3 JOHNSON, PRESTON, HINDERS, and LIPTON received a total of  
4 \$13,481,955.21 in Genesis Fund distributions. As the Genesis Fund  
5 administrator, VOGT admitted to issuing distribution checks to  
6 the nominee entities held by LEONARD and his co-conspirators.  
7 (See VOGT Plea Agreement, Exhibit A, ¶¶ 8-13.)

8 Accordingly, defendant LEONARD cannot complain that he has  
9 had insufficient information or time to contest the government's  
10 restitution calculation. Defendant LEONARD should be ordered to  
11 pay restitution in the amount of \$2,945,185.02 as calculated by  
12 the government.

13 **5. LEONARD's Ability to Pay Should Not Be Considered in**  
14 **Determining the Restitution Amount**

15 The government also anticipates that LEONARD may ask the  
16 Court to consider his ability to pay in determining the  
17 restitution amount. In his previously filed sentencing  
18 memorandum, defendant LEONARD agreed that a restitution hearing  
19 should be scheduled and stated that at such a hearing "the Court  
20 can assess Mr. Leonard's ability to pay whatever restitution is  
21 ordered." (LEONARD Sentencing Mem. at 8.) The Court should not  
22 consider LEONARD's ability to pay in determining the restitution  
23 amount.

24 As noted by the Ninth Circuit, Congress passed the Mandatory  
25 Victim Restitution Act of 1996 ("MVRA") as a supplement to the  
26 Victim and Witness Protection Act of 1982 ("VWPA"). 18 U.S.C. §  
27 3663. See Grice, 319 F.3d at 1177. Restitution under the VWPA is  
28



1 discretionary, and the district court must consider a defendant's  
2 resources when deciding if restitution is appropriate. 18 U.S.C.  
3 § 3663(a)(1)(A), (B). The MVRA, however, eliminates district  
4 courts' discretion with respect to restitution for certain  
5 classes of crimes. 18 U.S.C. § 3663A(a)(1). If the MVRA applies,  
6 a restitution order is mandatory regardless of the defendant's  
7 ability to pay. Id.; see also Grice, 319 F.3d at 1177. The  
8 offenses to which the MVRA applies include offenses against  
9 property under Title 18, including any offense committed by fraud  
10 or deceit. 18 U.S.C. § 3663A(c)(1)(A)(ii); see also Kubick, 205  
11 F.3d at 1128-29 (ordering mandatory restitution on convictions  
12 for conspiracy to commit bankruptcy fraud and conspiracy to  
13 impede and impair the IRS, each in violation of 18 U.S.C. § 371).

14 Defendant LEONARD pleaded guilty, in part, to conspiracy to  
15 defraud an agency of the United States, in violation of 18 U.S.C.  
16 § 371. Moreover, defendant LEONARD specifically agreed to pay  
17 restitution for the amount of loss caused by his conduct. (Plea  
18 Agreement ¶9.) Accordingly, the MVRA applies to this case,  
19 restitution is mandatory, and the Court should not consider  
20 LEONARD's ability to pay in determining the restitution amount.

21 ///

22 ///

23 ///

IV

CONCLUSION

For all the foregoing reasons, the government respectfully requests the Court to order defendant LEONARD to make restitution to the Internal Revenue Service in the amount of \$2,945,186.02 for the Criminal Conspiracy to which he pleaded guilty.

Date: November 23, 2009

Respectfully Submitted,

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